Supreme Court, U.S.
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No. 00-1262

IN THE

Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FMC CORPORATION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, FMC Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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42 U.S.C. § 6901 1

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40 C.F.R. § 265.22 5

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63 Fed. Reg. 66582 3

STATEMENT OF THE CASE

We supplement the facts in the Petition as follows. Since 1947, FMC Corporation ("FMC") has owned approximately 1,500 acres of land near Pocatello, Idaho (the "FMC Property"). The FMC Property is located near the eastern boundary of the Shoshone-Bannock Fort Hall Indian Reservation, with approximately 1,000 of those acres lying within the Reservation. The FMC Property is not owned by the United States for the benefit of the Shoshone-Bannock Tribes ("Tribes") or any of their members, is not owned in fee by the Tribes or any of their members, and is not leased by the United States to the Tribes or FMC. Non-Indians own most of the land immediately north, west and east of the FMC Property in fee. Very few people live on the land surrounding the FMC Property and nearly all of those people are non-Indians.

Since 1949, FMC has used the FMC Property, including both on-reservation lands and off-reservation lands, for operation of FMC's Pocatello elemental phosphorus plant (the "FMC Pocatello Plant")[1] Mineral processing wastes generated at the FMC Pocatello Plant first became subject to the Resource Conservation and Recovery Act ("RCRA") hazardous waste regulations in September 1989 and January 1990.[2] (ER 1 at ¶ 8.) Because RCRA is not retroactive, these

1. FMC transferred ownership and operation of the Pocatello facility to Astaris Idaho LLC, a joint venture formed by FMC and Solutia, Inc., in April 2000. The consent decree that is the subject of the Shoshone-Bannock Tribes' current petition requires a number of environmental measures at the Pocatello facility. FMC remains obligated to carry out these consent decree requirements notwithstanding the facility transfer to Astaris.

2. RCRA, 42 U.S.C. § 6901, was enacted in 1976 but implementing regulations did not become effective until (Cont'd)

requirements apply only to FMC's storage, treatment and disposal of mineral processing wastes generated after September 1989.

I. Consent Decree Negotiations.

In January 1997, the United States notified FMC that it intended to bring an action against FMC in the United States District Court for the District of Idaho for violations of RCRA. The United States Environmental Protection Agency ("EPA"), the United States Department of Justice ("DOJ") and FMC began settlement negotiations. The Tribes, represented by Tribal attorneys, environmental experts and Tribal members, participated actively in the settlement negotiations, and made specific requests to the United States and FMC regarding requirements the Tribes wanted to be included as part of any settlement between the United States and FMC. (CR 8 at 17; CR 15 at 4-6, 17-18.) The United States supported many requirements requested by the Tribes, and those requirements became key elements of the Consent Decree, including: (a) the requirement that FMC remove and treat wastes placed in Pond 18; (b) more stringent capping requirements for ponds; (c) pond management requirements designed to minimize risks associated with operation of ponds, including electronic leak detection, perimeter gas monitoring, and bird protection measures; (d) certain requirements of the air emission reduction Supplemental

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(Cont'd)
November 19, 1980. Until 1989, FMC Pocatello Plant mineral processing wastes were exempt from RCRA hazardous waste regulations under the Bevill Amendment. In September 1989 and January 1990, certain of FMC's mineral processing wastes became subject to RCRA, with the remaining portion still exempt under the Bevill Amendment. (ER 1 at ¶ 18.)

Environmental Projects (SEPs); and (e) the Tribal Health Assessment SEP. (CR 15 at 14, 18.) In every case, the Tribes' requested requirements were the subject of discussion and negotiation before a decision was made to include, or not include, the Tribes' request as a Consent Decree requirement. (CR 23 at 2.)

In October 1998, the United States and FMC reached a settlement agreement, the terms of which are set forth in the Consent Decree. On October 16, 1998, the United States filed its Complaint and lodged the proposed Consent Decree. The United States then published a notice regarding the Consent Decree and its availability for public comment in the *Federal Register* on November 2, 1998. 63 Fed. Reg. 58770. Notices of the Consent Decree and public comment period were also published in the *Idaho State Journal* and in the *Sho-Ban News*, the Tribes' newspaper. (SER 1.) At the request of the Tribes, the United States extended the initial 30-day period for public comment for an additional 15 days, extending the comment deadline from December 3, 1998 to December 18, 1998. 63 Fed. Reg. 66582.

EPA received written public comments and held public meetings on the Consent Decree in the City of Pocatello and at the Fort Hall Indian Reservation. The United States also met with representatives of the Tribes' Business Council. EPA and DOJ responded in writing to all public comments, including all comments received from the Tribes and Tribal members. *See United States v. FMC Corporation, Inc.* Proposed Consent Decree: Response to Public Comments. (SER 1-126.)

II. Consent Decree Requirements.

The Consent Decree covers only violations alleged in the Complaint relating to storage, treatment and disposal of FMC's mineral processing wastes generated *after* September 1989 and January 1990, the dates on which FMC's mineral processing wastes first became subject to the RCRA hazardous waste regulations. Other environmental impacts of the FMC Pocatello Plant operations are being addressed under the Comprehensive Environmental Response Compensation and Liability Act (EPA has issued a Record of Decision, currently being reviewed to address Tribal concerns, that will require remedial actions to address soil and groundwater contamination from historic releases of hazardous substances), the Clean Air Act (EPA has issued a Federal Implementation Plan that sets specific emission limits and air monitoring requirements for the Pocatello facility[3]), the Clean Water Act and other State and federal statutes.

The RCRA Consent Decree requires FMC to (1) make more than $150 million in capital improvements and operating changes that will assure full RCRA compliance at the FMC Pocatello Plant according to specific compliance schedules set forth in the Consent Decree; and (2) perform Supplement Environmental Projects not otherwise required by State or federal law that will reduce particulate air emissions from the FMC Pocatello Plant by approximately 67%, and that will fund a $1.65 million health assessment of the Shoshone-Bannock Tribes Fort Hall Reservation residents – a study the Tribes approved and will manage jointly with FMC.

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3. 40 C.F.R. § 49.10711 (65 Fed. Reg. 51412, August 23, 2000).

The Consent Decree is a settlement of disputed claims. FMC does *not* admit the violations alleged in the Complaint, or even that its wastes are subject to regulation under RCRA, and the United States has not proven the truth of its allegations. *See* ER at 33, "Whereas" clause at 2.[4]

EPA determined that the Consent Decree's requirements are protective of human health and the environment. For example, RCRA permits closure of ponds either by removing the wastes or by leaving the wastes in place and installing an appropriate protective cap. 40 C.F.R. § 265.22. Prior to approving closure in place and capping of FMC ponds, EPA determined that (1) it would be technically difficult to remove and treat wastes already disposed in ponds; (2) it would not be safe to remove pond wastes off-site for treatment; (3) the risk associated with leaving the wastes in place was minimal; and (4) groundwater, soil and sediment sampling data confirmed that the wastes stored in active ponds were not migrating from the ponds and contaminating groundwater or surface water. (SER at 17-18.) To provide an added level of assurance, the Consent Decree requires FMC to install

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4. In order to secure the injunctive relief provided by the Consent Decree, the United States would have to establish first that FMC's wastes are "ignitable" or "reactive" wastes subject to regulation under RCRA. Under RCRA, a solid waste is "hazardous" if it is listed as such in the RCRA regulations, or if the waste exhibits certain "characteristics" such as those for "ignitability" or "reactivity". RCRA does not list FMC's wastes as hazardous; and the RCRA regulations do not specify a test method for "ignitability" or "reactivity" that apply to FMC's wastes. (SER at 135.) FMC if necessary would litigate the classification of its wastes as ignitable or reactive and, given the lack of prescribed test methods and numerical standards for making these designations, would expect to prevail on its position that the Pocatello wastes are not ignitable or reactive characteristic wastes.

caps that are more protective than normally required for RCRA closure. The cap design selected by EPA is comparable to those used for radioactive waste landfills which may be dangerous for thousands of years. (SER at 18-19.)

Further, the Consent Decree requires that FMC cease placing wastes in ponds by no later than May 2002. This requirement ensures compliance with the RCRA land disposal restrictions ("LDRs"), which prohibit the placement of hazardous wastes on land unless the wastes comply with EPA-specified treatment levels. The Consent Decree specifically requires FMC to design and construct a waste treatment plant that will achieve LDR treatment standards applicable to the FMC Pocatello Plant wastes, to commence operation of the LDR treatment plant by May 2002, and thereafter to permanently cease placing wastes in ponds. (ER at 84-85.)

To protect human health and the environment during the time the ponds are in operation prior to May 2002, the Consent Decree requires FMC to comply with the EPA-approved Pond Management Plan and other requirements of the Consent Decree. (ER at 86.) The Tribes participated actively in formulating the Pond Management Plan requirements. The Pond Management Plan requires actions such as installation of monitoring equipment around the ponds and at the Facility fence line to measure and record emissions of toxic gases, contingency measures in the event that toxic gases exceed human health criteria, implementation of worker safety measures, implementation of operational changes that will reduce the potential for toxic gas emissions, installation of video cameras for continuous real-time surveillance of the ponds, expansion of existing fencing

around the ponds, and installation of nets or other devices to prevent migratory birds from landing on the ponds. (ER at 86.) EPA determined that compliance with the Pond Management Plan would be protective of human health and the environment. *See* SER at 10-14. Moreover, with knowledge of the Consent Decree requirements, the Tribes granted permits to FMC for its construction and continued use of ponds for waste storage. On April 13, 1998, FMC obtained a special use permit for the ponds from the Tribal Land Use Policy Commissioners, subject to payment of a $1 million startup fee and a $1.5 million annual permit fee payable to the Hazardous Waste Program of the Tribes Land Use Department. (CR 15 at 14-15.)

As part of the Consent Decree, FMC agreed to spend over $65 million on Supplement Environmental Projects ("SEPs") that will reduce particulate air emissions from the FMC Pocatello Plant by approximately 67%. SEPs are environmentally beneficial projects, *not* otherwise required by applicable federal, state or local laws or regulations, that FMC agreed to perform in exchange for partial reduction in the civil penalty amount assessed under the Consent Decree. At the outset of the Consent Decree negotiations, the Tribes and EPA told FMC they were interested primarily in SEPs that would reduce particulate air emissions from the Pocatello Plant significantly in advance of the effective date of the Federal Implementation Plan for the Pocatello region. (CR 15 at 15-17.) FMC responded by developing 13 air emission reduction projects to be incorporated in the Consent Decree as SEPs. The scope of each project was negotiated with and accepted by EPA Region 10 air officials, with input from the Tribes. Most of these SEPs have already been installed or otherwise carried out.

Finally, the Consent Decree requires FMC to spend $1.65 million to fund a joint study, managed by FMC and the Tribes, to assess the human health effects on residents of the Fort Hall Reservation from the FMC Pocatello Plant releases of hazardous substances. The study is included in the Decree as a SEP. (ER 32.)

REASONS FOR DENYING THE WRIT

I. The Tribes' Factual Assertions are Unsupported.

The Tribes' Petition for Writ of Certoriari alleges that FMC's Pocatello Plant mineral processing wastes are "ignitable" or "reactive" hazardous wastes subject to regulation under RCRA. Tribes' Petition at 3. This assertion is unproven. *Supra* at page 5, n.4. The Tribes also misperceive the scope of the Consent Decree as covering 50 years of FMC Pocatello Plant operations, including past and future air emissions, and historic releases of hazardous substances. Tribes' Petition at 3, 5. The Consent Decree is limited in scope to hazardous waste management and in time to FMC's waste management after RCRA requirements became applicable in September 1989. And the Tribes' Petition is based on the assumption that measures adequate to protect the general public's health and the environment will not be equally protective of Tribal health and the environment. There is no evidence in the record to support this assumption.

II. The Decision Below Does Not Conflict with Decisions by this Court.

The United States and FMC agreed to the Consent Decree, thereby avoiding litigation between the parties that could have resulted in fewer, less restrictive requirements

than those set forth in the Consent Decree. EPA agreed to the Consent Decree after diligent, good faith consultations with the Tribes, and after determining that the Consent Decree would be protective of human health and the environment. The Tribes were present and participated in negotiatons between the United States and FMC regarding the environmental requirements of the Consent Decree. Indeed, many Consent Decree requirements were included at the specific request of Tribal representatives. While the Tribes believe the Consent Decree is not perfect in every respect, they failed to offer the District Court evidence that the Consent Decree is not reasonable, and protective of Tribal human health and the environment. Moreover, the record in this case establishes that the United States fulfilled its fiduciary duties to the Tribes by consulting extensively with the Tribes regarding Consent Decree requirements, including the Tribes in negotiations with FMC, and including many requirements requested by the Tribes.

The District Court entered the Consent Decree having considered all relevant law and material facts, including all objections to the Consent Decree made by the Tribes. The District Court found no legal or factual basis to refuse to enter the settlement that the United States Environmental Protection Agency and the Department of Justice determined to be a reasonable and environmentally protective means to assure that the FMC Pocatello Plant operates in compliance with RCRA.

The Ninth Circuit reviewed the District Court's decision and determined that the United States had appropriately discharged its fiduciary duties to the Tribes. Contrary to the Tribes' assertion, the Ninth Circuit decision does not establish "an extraordinary exception to its [the United States]

established fiduciary duties to Indian tribes." Tribes' Petition for Certiorari at 6. Rather, the Ninth Circuit's decision is consistent with the decisions of other Courts of Appeal and this Court regarding the fiduciary duties of the United States to Indian tribes.

CONCLUSION

For the foregoing reasons FMC respectfully requests that this petition for certiorari be denied.

Respectfully submitted,

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